



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Assistant Secretary for Public Affairs
Washington, D.C. 20201

August 1, 2018

HHS FOIA Request: 2018-00217-FOIA-OS

Legal Case: 1:18-cv-00466-CRC

Mr. Daniel Stevens
Executive Director
Campaign for Accountability
611 Pennsylvania Ave., S.E. #337
Washington, D.C. 20003

Via E-mail: dstevens@campaignforaccountability.org

Dear Mr. Stevens:

This letter is the second interim response to your November 8, 2017, Freedom of Information Act (FOIA)¹ request, which Ms. Katie O'Connor (formerly of your staff) sent via electronic mail to the attention of Michael Marquis, FOIA Director, Department of Health and Human Services (HHS or Department). In accordance with the June 4, 2018 minute order of the Court, our agency will be providing rolling responses to your FOIA request in accordance with the Court-established schedule, as we continue with our review of the records located. This letter constitutes our second response for the records we have reviewed to date.

To reiterate the scope and substance of your organization's FOIA request, you sought two itemized categories of records as described below, for the time period of January 20, 2017, to the date the records search began:

- 1) All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, or other materials received by HHS from, sent by HHS to, or exchanged between HHS and representatives of Alliance Defending Freedom, the Heritage Foundation, the Susan B. Anthony List, and Concerned Women for America about the May 4 "Promoting Free Speech and Religious Liberty" executive order, the HHS rules that are being drafted in response to that order, or any other efforts to alter or weaken the Affordable Care Act's contraceptive mandate.
- 2) All calendar entries reflecting meetings between HHS and representatives of Alliance Defending Freedom, the Heritage Foundation, the Susan B. Anthony List, and Concerned Women for America about the May 4 "Promoting Free Speech and Religious Liberty" executive order, the HHS rules that are being drafted in response to that order, or any other efforts to alter or weaken the Affordable Care Act's contraceptive mandate.

¹ 5 U.S.C. § 552

As we advised in our July 2, 2018 initial response, upon receiving your request, the Department conducted an electronic search of the e-mail accounts and calendars of the HHS staff members who would customarily maintain these categories of records, if existent. As a result of that search, almost 7 gigabytes of records in personal storage table (.pst) format were located which may be potentially responsive to your request; however, those records require further review to determine whether they are indeed responsive. For this second response, we have reviewed over 800 e-mails and calendar entries, with an approximate size of 215 megabytes. Those e-mails, calendar entries and attachments, after conversion from the .pst file format in which they were provided to our office to a page-countable format, totaled approximately 17,550 pages of records.

After a review for responsiveness, four (4) pages of records were found to be responsive to your request. After a careful review, we have made the following disclosure determination for those pages:

- Two (2) pages are being released in full;
- One (1) page is being released with redactions under FOIA Exemption 5, and;
- One (1) page is being released with redactions under FOIA Exemptions 5 and 6.

Exemption 5 - Deliberative Process Privilege

The deliberative process privilege protects “advice, recommendations, and opinions that are part of the deliberative, consultative and decision making process of the government.” The purpose of this privilege is threefold: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for an agency’s action.

In order to withhold information under the deliberative process privilege, it is necessary to demonstrate two things: (1) that the withheld information is predecisional, i.e., “antecedent to the adoption of an agency policy,” and (2) that the withheld information is deliberative, i.e., “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” In this case, we are withholding portions of an internal agency e-mail exchanged between HHS staff members, which contained preliminary discussions of the potential subject matter and focus of the meeting.

Attorney-Client Privilege

Additionally, the attorney-client privilege falls under the protections afforded under Exemption 5. That privilege is also invoked on one of the above referenced redacted pages, in that these records contain confidential communications between an HHS Office of the General Counsel attorney and agency employees, within which certain legal advice is provided.

Exemption 6

FOIA Exemption 6 permits a federal agency to withhold information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." The United States Supreme Court has held that Congress intended the term "similar files" to be interpreted broadly, rather than narrowly.² The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information" and opined that information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. In analyzing these records, we find they meet this threshold requirement of the Exemption.

When a privacy interest is found to exist, the public interest in disclosure of the information, if existent, must be examined and weighed against the privacy interest in nondisclosure. In this case, a telephone number was redacted under this Exemption. The release of this information would not serve to enhance or increase the public understanding of government functions, but would pose a harm to privacy interests, and thus the invocation of Exemption 6 is appropriate.

We are continuing to review the records located in response to your FOIA request, and as stated above, will be responding to your FOIA request with subsequent monthly productions.

Sincerely,

Mark Bily
For

Michael S. Marquis
Director
Division of Freedom of Information \ Privacy Acts

Enclosures

cc: Jason T. Cohen, Esq.
A. Mackenna White, Esq.
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² *United States Department of State v. Washington Post Co*, 456 U.S. 595 (1982)).